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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. STEVEN COTAYA, Defendant and Appellant.	B209642 (Los Angeles County Super. Ct. No. VA098416)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne Sanchez, Judge. Affirmed as modified with directions.

Allen Bloom for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Marc A. Kohn Deputy Attorneys General, for Plaintiff and Respondent.

RELEVANT PROCEDURAL HISTORY

On May 2, 2007, an eight-count information was filed against appellant Steven Cotaya, alleging that he had committed offenses on two different dates. Under counts 1 and 2, the information charged that on September 20, 2006, appellant assaulted Michael and James Olson with a firearm (Pen. Code, § 245, subd. (a)(2)).[1] Under the remaining counts, the information charged that on October 29, 2006, appellant robbed Cesar Campillo, John Rivas, and Jorge Arredondo (§ 211; counts 3 though 5); attempted to rob Dilbert Rivas (§§ 211, 664; count 6); assaulted Deandre Brown with a firearm (§ 245, subd. (a)(2); count 7); and shot at an occupied motor vehicle (§ 246). Accompanying counts 1 through 7 were gun use allegations (§§ 12022.5, 12022.53). Appellant pled not guilty and denied the special allegations.

Trial was by jury. On October 22, 2007, the jury found appellant guilty as charged on counts 3 through 8, and also found true the special allegations. The jury found appellant not guilty on counts 1 and 2. On June 25, 2008, the trial court sentenced appellant to a total term of 30 years in prison.

FACTS

A. *Prosecution Evidence*

1. *Counts 1 and 2*

On September 20, 2006, Michael Olson and his cousin, James Olson, drove to an ARCO gas station at the intersection of Garfield Avenue and Century Boulevard. Michael remained in the car while James bought beer. Shortly after a

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[1] All further statutory citations are to the Penal Code.

Honda and a van departed from the gas station, they heard gunshots. They identified appellant in a photographic lineup and at trial as the Honda's occupant.

2. *Counts 3 Through 8*

After midnight on October 29, 2006, Cesar Campillo, Dilbert Rivas, John Rivas, and Jorge Arredondo were entering their car in a restaurant parking lot near the intersection of Garfield Avenue and Century Boulevard. A male approached, pointed a gun at them, and demanded their possessions. Campillo gave him a cell phone, John Rivas gave him a key, and Arredondo gave him approximately five dollars. Dilbert Rivas gave him nothing. The male then left in a car.[2]

Campillo approached Deandre Brown and told him about the incident. As they talked, Campillo noticed a car nearby that he believed to be the robber's vehicle. As the car drove away, Brown entered his truck and began to pursue it. The car reappeared behind his truck, and someone in the car fired shots at him that smashed his car windows. Brown ducked to avoid being hit. When he lifted his head, the car had disappeared, and he found gunshot holes in his truck. During the incident, Brown did not see the car's occupants. He returned to where he had encountered Campillo.

Campillo and Brown flagged down patrol cars driven by Los Angeles County Deputy Sheriffs Gregory Berg and Stephen Capra. While the deputy sheriffs talked to Campillo and Brown, they heard gunshots that appeared to come from the nearby ARCO gas station at the intersection of Garfield Avenue and Century Boulevard. When Deputy Sheriff Berg arrived at the gas station, he saw a

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[2] Dilbert Rivas testified that he once told an investigating officer that the car might have been a beige Honda.

parked tan four-door Honda sedan and a male Hispanic standing near it. As Deputy Sheriff Capra approached the gas station, he saw appellant standing next to the cashier, who waved the deputy sheriff over to him. The person whom Deputy Sheriff Capra identified as appellant ran away, and was not captured.

The Honda belonged to appellant's father. The car contained a loaded handgun and three expended bullet casings. The deputy sheriffs brought Brown to the gas station to view the Honda, which he identified as the car that had pursued him.[3] Investigating officers later found a purse in the car that contained an identification card belonging to Chrystal Gastelum, who was then appellant's girlfriend.[4] No identifiable fingerprints were discovered on the gun in the Honda.

Arredondo selected appellant's photo in a photographic lineup, but acknowledged at trial that the person in the photo merely "looked similar to the one who robbed [him]." When Campillo was shown a photographic lineup, he circled appellant's photo and added the notation, "similar but not sure." Dilbert Rivas circled the photo of someone other than appellant in a photographic lineup, but added the notation, "Possibly but not sure." An investigating officer recorded Dilbert Rivas's remarks at the time as follows: "choice between 4 [appellant's photo], 5, 6, all look similar but three is first choice." John Rivas selected two photos, including appellant's, in the photographic lineup. An investigating officer added the notation, "indicated photos in the following positions look similar to the

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[3] The deputy sheriffs also brought Campillo to the gas station, but he did not recognize the Honda.

[4] The prosecution called Chrystal Gastelum as a witness, who testified that she knows appellant, but otherwise asserted her privilege against self-incrimination, and refused to answer any further questions.

suspect." None of these witnesses identified appellant as the robber at the preliminary hearing or at trial.

A DVD containing a video recording from surveillance cameras at the gas station was admitted into evidence. The video recording contained a two-minute gap, and did not show appellant standing at the gas station or fleeing from it.

B. *Defense Evidence*

Priscilla Aparicio testified that on October 4, 2007, she and appellant's aunt drove through the area near the intersection of Century Boulevard and Garfield Avenue, and saw many light-colored four-door Hondas.

Ali Zarrin, the owner of the ARCO gas station at Garfield Avenue and Century Boulevard, testified that its security cameras were triggered by motion detectors, and stopped working in the absence of moving vehicles or persons. Zarrin acknowledged that the motion detectors did not always start the cameras, and attributed the two-minute gap in the video recording to a "glitch."

DISCUSSION

Appellant contends (1) that the prosecutor improperly commented on his failure to testify, (2) that he received ineffective assistance of counsel, (3) that he was denied due process when testimony was read to the jury in his absence, and (4) that there was juror misconduct. We disagree.

A. *Improper Comment By Prosecutor*

Appellant contends that the prosecutor's closing argument constituted improper comment on his failure to testify, and thereby shifted the burden of proof to him to establish his innocence. During closing argument, the prosecutor

asserted that there was no evidence to explain appellant's flight from the ARCO gas station on October 29, 2006. Appellant contends that this remark improperly drew the jury's attention to his failure to testify, arguing that only he could have explained his flight. In our view, appellant is mistaken.

Our Supreme Court has explained: "In *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. Its holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.] Nonetheless, . . . a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided only by the defendant, who therefore would be required to take the witness stand. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339, italics deleted.)

Instructive applications of these principles are found in *People v. Johnson* (1992) 3 Cal.4th 1183 (*Johnson*) and *People v. Hughes* (2002) 27 Cal.4th 287 (*Hughes*). In *Johnson*, the defendant was charged with the murder of a mother and the attempted murder of her daughter. (*Johnson*, *supra*, 3 Cal.4th at p. 1205.) At trial, the daughter testified that the defendant and an accomplice entered her house, and shot her and her mother. (*Id*. at pp. 1206-1207.) The defendant's sole witness was an eye witness identification expert. (*Id*. at pp. 1209-1210.) During closing argument, the prosecutor asserted: "'[T]he uncontradicted evidence is that the defendant was there, that the defendant did kill [the mother], that the defendant did shoot [the daughter]. That is uncontradicted.'" (*Id*. at p. 1229.)

Notwithstanding the prosecutor's characterization of the evidence as "uncontradicted," the Supreme Court rejected the defendant's contention that these remarks constituted *Griffin* error. (*Johnson*, *supra*, 3 Cal.4th at p. 1229.) "[T]he defense challenged [the daughter's] identification testimony, implicitly contending that defendant was elsewhere than at the [victims'] residence on the night of the crime. However, the defense presented no alibi evidence to support the contention. [Citation.] Thus, the prosecutor's comment merely reflected the state of the evidence. [Citation.]" (*Ibid*.)

In *Hughes*, the defendant was charged with murder, burglary, and sodomy. (*Hughes*, *supra*, 27 Cal.4th at p. 315.) At trial, the prosecutor presented evidence that the defendant lived near the victim's apartment, and that his fingerprints were found at the crime scene. (*Id*. at pp. 316-317.) The defendant responded with evidence that he was highly intoxicated at the time of the murder. (*Id*. at pp. 321-323.) During closing argument, the prosecutor remarked that the defendant had provided no witness regarding his ingestion of intoxicants immediately prior to the killing or the events in the victim's apartment. (*Id*. at p. 373.) The Supreme Court concluded that these remarks, viewed in context, did not constitute *Griffin* error: "Under the defense theory of the case, [the] defendant was in an unconscious state during the killing, and hence could not be expected to have provided answers to the prosecutor's questions, even had he taken the witness stand. In this setting, we view the challenged questions posed in the prosecutor's closing argument . . . as nothing more than proper fair comment on the state of the evidence." (*Hughes, supra*, 27 Cal.4th at p. 373.)

Regarding appellant's flight from the ARCO gas station, the defense theory of the case was that the deputy sheriffs' testimony about the events at the station -- including appellant's purported flight -- was untrustworthy. In opening

statements, defense counsel asserted that the ARCO gas station's security cameras were triggered by motion detectors, yet the cameras did not record appellant's presence at the gas station or his purported flight. Appellant presented Zarrin's testimony in support of this contention, and his counsel's closing argument asserted that the deputy sheriffs' account of the events at the ARCO gas station was not credible.

The prosecutor's remarks that appellant challenges as *Griffin* error occurred during the opening portion of closing argument. The prosecutor asked the jurors not to make a decision "because of one person's testimony," and urged them to view the prosecution case regarding the October 29, 2006 offenses as a puzzle made up of items of circumstantial evidence. He argued that it was reasonable to conclude that appellant had been driving the Honda found at the ARCO gas station, as it was registered to appellant's father and contained his girlfriend's purse, and Deputy Sheriff Capra had testified that he saw appellant at the gas station.

The prosecutor then argued that an element of circumstantial evidence was "flight from the scene."[5] He asserted: "Flight is one of the circumstances you can use when you make a determination; if it's by itself you can't. But coupled with everything else that evening, you can use it as one more reason why [appellant] . . . was guilty of the crime . . . . *And you have no other evidence in this case that explains why he fled from the scene*." (Italics added.) Defense counsel moved for

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[5] Prior to closing argument, the court had instructed the jury, pursuant to CALCRIM No. 372, as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." Appellant does not assign error to the instruction.

a mistrial, arguing that the italicized portion of these remarks were *Griffin* error. In denying the motion, the trial court noted that there was "a question of whether or not . . . [appellant] was even at the gas station."

We agree with the trial court that the prosecutor's remarks were nothing other than fair comment on the evidence. Appellant's defense was that Deputy Sheriff Capra's testimony regarding the events at the ARCO gas station was inaccurate, as the motion detectors did not trigger the security cameras when the events occurred. The prosecutor never asserted that the evidence bore on whether appellant was present at the gas station or that his flight was "uncontradicted" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339); rather, the prosecutor argued that the evidence of appellant's flight should be assessed in the light of "everything else that evening." Moreover, the prosecutor's reference to the potential inference that the jury could draw from the flight -- namely, that it corroborated appellant's guilt -- was permissible comment on the evidence. (See *People v. Bolin* (1998) 18 Cal.4th 297, 326-327 [instruction regarding inference that may be drawn from defendant's flight does not contravene *Griffin*].) Viewed in context, the prosecutor's remark merely underscored the absence of evidence -- from anyone -- that might suggest an alternative reason for appellant's alleged flight (such as the sound of gunshots, which initially attracted Deputy Sheriff Capra to the station). In sum, there was no *Griffin* error.

B. *Ineffective Assistance of Counsel*

Appellant contends that his trial counsel rendered ineffective assistance in failing to secure an expert on eye witness identifications. We disagree.[6] As explained below, appellant has not established that defense counsel's performance was deficient.

Generally, defense counsel is accorded considerable latitude in the selection of a defense strategy (*People v. Cunningham* (2001) 25 Cal.4th 926, 1004-1007), provided that it is informed by adequate investigation and preparation (*In re Marquez* (1992) 1 Cal.4th 584, 602). To show deficient performance, appellant must "demonstrate[] that the record affirmatively discloses that counsel's acts or omissions cannot be explained on the basis of any knowledgeable choice of tactics. [Citation.]" (*People v. Shoals* (1992) 8 Cal.App.4th 475, 501.) As defense counsel was never asked to explain why he did not call an eye witness expert, we will reject appellant's contention unless the record discloses that there "simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) That is not the case here.

The witnesses who identified appellant as a participant in the events on October 29, 2006, were the four victims in the restaurant parking lot, and Deputy Sheriff Capra. In lieu of presenting an expert witness, defense counsel vigorously cross-examined these witnesses. As defense counsel also crossed-examined them

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[6] "In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

during the preliminary hearing, he was aware of their likely testimony prior to trial. In view of this fact, defense counsel's trial tactics were not ill informed.

Significantly, none of the victims identified appellant during the preliminary hearing or at trial. At trial, the victims testified that the robberies took place quickly and at night, that they were frightened during the incident, and that they were not confident about their identifications of appellant's photo in the photographic lineups. On cross-examination, defense counsel underscored the victims' admitted uncertainties about the robber's identity.

On this record, we cannot conclude that defense counsel's decision to rely on cross-examination to challenge the victims' testimony fell below professional norms. As our Supreme Court has remarked, "[e]xpert testimony on the psychological factors affecting eyewitness identification is often unnecessary." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995.) In our view, this is such a case, as the witnesses themselves admitted uncertainty about their identification. (See *People v. Cunningham*, *supra*, 25 Cal.4th at pp. 1004-1005 [defense counsel did not render ineffective assistance by relying on cross-examination to attack identification provided by key prosecution witness, who was drunk at time of offense, and viewed perpetrator in poor lighting conditions].)

The other witness to identify appellant as a participant in the events on October 29, 2006, was Deputy Sheriff Capra. At trial, Capra testified that he first saw appellant at a distance of 75 to 100 feet, and that he viewed appellant continuously as he approached to within a few feet of him. According to Capra, appellant's face was well lit. During cross-examination, defense counsel elicited from Capra that the gas station's security cameras did not record appellant's presence or flight. In closing argument, defense counsel contended that it was

implausible that appellant, if guilty of the offenses charged, would have waited until Capra was close to him before fleeing.

In our view, the record does not establish that defense counsel's performance was deficient. Because the decision to call a witness is a matter of trial tactics, a reviewing court generally will not "second guess" this decision. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058-1059.) Moreover, appellant "must do more than surmise that defense experts might have provided more favorable testimony." (*People v. Lucas* (1995) 12 Cal.4th 415, 448, fn. 5, italics deleted.) Here, defense counsel attacked the overall plausibility of Capra's account, rather than challenging the reliability of Capra's identification. The record does not disclose how expert testimony might have assisted appellant in challenging Capra's identification. But as the identification occurred in what appear to be favorable conditions, defense counsel reasonably could have decided that expert testimony carried a greater potential for harm than good to appellant's defense. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 115.)

Moreover, even if we were to conclude (and we do not) that defense counsel erred in failing to secure expert witness testimony, this conduct was not prejudicial. The prosecution case did not rely on the identification testimony of any single witness, but on the cumulative effect of the overlapping identifications by several witnesses, corroborated by circumstantial evidence that pointed to appellant as the perpetrator of the October 29, 2006 offenses. Appellant has not shown how expert testimony on eye witness identifications was reasonably likely to have diminished the cogency of the prosecution's overall case. In sum, the record fails to demonstrate that appellant received ineffective assistance from his defense counsel.

C. *Absence During Rereading of Testimony to Jury*

Appellant contends that the trial court erred in allowing trial testimony to be reread to the jury in appellant's absence. As explained below, appellant's contention fails for want of a showing of prejudice.

Generally, "[a] criminal defendant . . . has a right to be personally present at trial under various provisions of law, including . . . the due process clause of the Fourteenth Amendment . . . ; section 15 of article I of the California Constitution; and sections 977 and 1043 . . . ." (*People v. Waidla* (2000) 22 Cal.4th 690, 741.) Sections 977 and 1043 provide that defendants facing felony charges are entitled to be present during the rereading of testimony to the jury, but may relinquish this right by executing a personal written waiver.[7] (*People v. Avila* (2006) 38 Cal.4th 491, 597-598 & fns. 58, 59 (*Avila*).)

Appellant argues that the trial court denied him due process by permitting rereading of testimony to the jury in his absence and without his personal waiver. Shortly before the jury began its deliberations, defense counsel agreed in open court that the court reporter would be permitted to read testimony to the jury in the

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[7] Subdivision (b)(1) of section 977 provides: "In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . . "

Subdivision (a) of section 1043 provides that with exceptions not relevant here, "the defendant in a felony case shall be personally present at the trial." Subdivision (d) of section 1043 states that the provisions in subdivision (a) "shall not limit the right of a defendant to waive his right to be present in accordance with Section 977."

jury room. The court reporter later reread portions of the trial testimony to the jury, in accordance with the agreement.

In *Avila*, our Supreme Court rejected the same contention on essentially similar facts. (Avila, *supra*, 38 Cal.4th at pp. 597-598.) There, the prosecutor and defense counsel agreed that the court reporter could reread trial testimony in the jury room. (*Ibid.*) The defendant did not personally waive his presence during the rereading of the testimony. (*Id*. at p. 598.) On appeal, the defendant contended that he had been denied due process and his statutory right to be present during the readback. (*Ibid*.) Because the defendant did not show that the result of his trial would have been different had he been present, the court found no reversible error. (*Ibid*.) As appellant also makes no such showing, his contentions fail under *Avila*.

D. *Juror Misconduct*

Appellant contends that the trial court erred in denying his motion for a new trial on the basis of juror misconduct. We disagree. For the reasons explained below, the trial court properly determined that there was no juror misconduct.

"'[W]here a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance . . . which suggests a likelihood that one or more members of the jury were influenced by improper bias.' [Citation.] A juror who 'consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors' commits misconduct. [Citation.] Jury misconduct 'raises a rebuttable "presumption" of prejudice.' [Citation.] [¶] On appeal, the determination whether jury misconduct was prejudicial presents a mixed question of law and fact '"subject to an appellate court's independent determination."' [Citation.] We accept the trial court's factual findings and

credibility determinations if supported by substantial evidence. [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 192, italics deleted.)

On March 5, 2008, approximately four-and-one-half months after the jury verdict, appellant filed a motion for a new trial, asserting that he had discovered new evidence relevant to his guilt, and that there had been "[s]everal instances of prejudicial juror misconduct."[8] Accompanying the motion was an unsigned statement, purportedly from Chrystal Gastelum, appellant's former girlfriend, which asserted that on October 29, 2006, appellant was occupied with a search for some youths who had stolen a cellphone from his aunt's house. No evidence of juror misconduct accompanied the motion.

Two months later, on May 6, appellant submitted a declaration from Chrystal's mother, Amparo Gastelum. The declaration stated: "[O]n the final day of the trial in October 2007 when the verdict was given I heard a juror (the only male juror on the panel) state that he had discussed the trial and the evidence presented at trial with his wife [and] family[,] and they came to the conclusion that [appellant] was guilty of the crime. [¶] I confronted said male juror in the front of the courthouse in the presence of [six] other female jurors and asked him if he heard the [j]udge's instruction regarding not talking about the case to anyone, and he replied that [appellant] is just going to get a slap on the hand, so he needs to learn a lesson. He further indicated that he and his family investigated the matter and found that the [appellant] had to be guilty."

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[8] Shortly after the trial began, the trial court addressed an apparent attempt by appellant's family to influence the jury. At that time, a juror told the trial court that he had been contacted by a former schoolmate, who is appellant's aunt. The trial court dismissed the juror.

In response to the motion, the trial court heard testimony from Juror No. 6, the sole male juror. After the juror acknowledged that he may have spoken to other jurors in the court hallway following the verdict, the following colloquy occurred:

"The Court: Did you, sir, indicate to those other jurors that you had discussed this case with your wife and family before reaching your verdict?

"Juror [No.] 6: No, I did not.

"The Court: Did you indicate to the other jurors that you had discussed the case with your wife and family and that they had come to the conclusion that [appellant] was guilty of the crime?

"Juror [No.] 6: No, I did not.

"The Court: Sir, did you have any discussion with other persons, not members of the jury, . . . before reaching your verdict regarding this case?

"Juror [No.] 6: No, I have not."

Neither the prosecutor nor defense counsel directed other questions to Juror No. 6.

The trial court also heard testimony from Amparo Gastelum, which was materially similar to her declaration. She further testified that after her encounter with Juror No. 6, she immediately related what he had said to defense counsel and members of appellant's family who were in the courthouse. She acknowledged having prepared her declaration in response to a request from appellant's mother. When asked by the prosecutor whether she had attended the trial proceedings, Gastelum responded, "I attended the hearing. I felt that I was forced to from all the -- see, they picked him up at my home with my family visiting there. I live next to doctors and lawyers, and they put me through a lot, they put my grandson outside in the cold day of winter." Following Amparo Gastelum's testimony, the trial court found that she was not credible, and denied the motion for a new trial.

We find no error in this ruling. As our Supreme Court has explained, when, as here, the trial court renders a factual finding regarding the existence of juror misconduct, "[t]he power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court, and its findings of fact, express or implied, must be upheld if supported by substantial evidence." (*In re Carpenter* (1995) 9 Cal.4th 634, 646-647.) The testimony from Juror No. 6 provides ample support for the trial court's determination.[9]

Appellant's reliance on *In re Stankewitz* (1985) 40 Cal.3d 391 is misplaced. There, our Supreme Court determined that the evidentiary showing in connection with the defendant's petition for writ of habeas corpus unequivocally established juror misconduct. (*Id*. at pp. 395-403.) Here, unlike *Stankewitz*, the trial court determined, following an evidentiary hearing, that no juror misconduct occurred,

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[9] In an apparent effort to establish that Juror No. 6 was not a credible witness, appellant points to remarks that Juror No. 6 made during voir dire, and argues that they show that Juror No. 6 was biased against appellant. The remarks do not do so.

During voir dire, the trial court asked Juror No. 6 -- then a prospective juror -- whether he would find a defendant guilty if the prosecution presented 50 witnesses who knew nothing about the crime, and the defense presented no evidence. Juror No. 6 responded: "[I'm] going to give [the prosecution] points, *not going to help them*." (Italics added.)

When the trial court asked Juror No. 6 to clarify his remark about points, Juror No. 6 responded that he had been thinking about a prior remark by an attorney regarding the existence of police reports. The following exchange occurred:

"The Court: . . .[L]et's say the officers get up here and they don't know why they are here either. This is all hypothetical . . . .

"[Juror No. 6.:] *They didn't prove anything.*

"The Court: It doesn't matter what the defense does?

"[Juror No. 6]: *Correct.*

"The Court: Is that correct?

"[Juror No. 6]: *Yes*." (Italics added.)

As nothing in these remarks suggests that Juror No. 6 was biased, they cannot undermine the trial court's finding that Juror No. 6 did not engage in misconduct.

and there is substantial evidence to support the determination.[10] In sum, the trial court properly denied the motion for a new trial on the basis of juror misconduct.

E. *Security Fees*

Respondent contends that the trial court erred in failing to impose six $20 security fees. Subdivision (a)(1) of section 1465.8 obliges the trial court to impose a $20 security fee "on every conviction for a criminal offense." Here, appellant was convicted of six offenses, but the abstract of judgment reflects only one $20 security fee. Appellant does not dispute that six fees were required to be imposed.

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[10] On a related matter, appellant contends that the trial court erred in denying his defense counsel's request to call other jurors to provide testimony regarding the purported incident regarding Juror No. 6, or alternatively, to permit him to contact the jurors. As appellant has not supported this contention with any legal authority, he has forfeited it. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, pp. 769-771.)

Moreover, were we to address the contention, it would fail on its merits. The trial court is obliged to hold an evidentiary hearing regarding juror misconduct "'only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred.'" (*Avila*, *supra*, 38 Cal.4th at p. 604.) A showing based on hearsay evidence of juror misconduct is ordinarily insufficient to carry this burden, and "'[t]he hearing should not be used as a "fishing expedition" to search for possible misconduct.'" (*Id*. at p. 604, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 419.) Similarly, to obtain contact information for jurors, a defendant must establish "good cause." (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1320; Code Civ. Proc., § 237, subd. (b).)

Although Amparo Gastelum's declaration in support of the new trial motion provided only hearsay evidence of juror misconduct, the trial court conducted an evidentiary hearing and found her testimony not credible. In view of her testimony and the prior attempt by appellant's family to influence a juror, we see no error in this finding or in the trial court's determination that further inquiry into juror misconduct was unwarranted. (See *Avila*, *supra*, 38 Cal.4th at pp. 604-605 [trial court properly denied evidentiary hearing into juror misconduct when defendant offered only hearsay evidence of misconduct and pertinent juror refused to confirm alleged misconduct].)

(*People v. Schoeb* (2005) 132 Cal.App.4th 861, 866 [defendant convicted of nine offenses must pay nine $20 security fees].) Accordingly, the judgment must be amended to reflect the imposition of six $20 security fees.

DISPOSITION

The judgment is modified to reflect the imposition of six $20 security fees (§ 1465.8), and is affirmed in all other respects. The superior court is directed to prepare an amended abstract of judgment to reflect the modification of the judgment, and to forward a copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P.J.

SUZUKAWA, J.